

**Exhibit 3**

***ProCare* Hearing Transcript**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: \* Case No. 06-10605  
\*  
\* Cleveland, Ohio  
\*  
PROCARE AUTOMOTIVE SERVICE \* April 28, 2006  
SOLUTIONS LLC \*  
\* \* \* \* \*

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE PAT E. MORGENSTERN-CLARREN  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

ALAN LEPENE, ESQ.  
JEREMY CAMPANA, ESQ.  
For the Debtor

SCOTT OPINCAR, ESQ.  
For the Committee of Unsecured Creditors

WILLIAM SCHONBERG, ESQ.  
STUART LAVEN, ESQ.  
For Key Mezzanine Capital, et al.

LAWRENCE GELBER, ESQ.  
For Monro Muffler Brake

PATRICK CAROTHERS, ESQ.  
For Stoney Hollow Tire

IAN REDMOND, ESQ.  
For GE Capital

SUZANNA KOCH, ESQ.  
For J.P. Morgan Chase

TIMOTHY KERN, ESQ.  
For State of Ohio Fire Marshal

EDWARD LEEN, ESQ.  
For BP Products North America

ROCCO DEBITETTO, ESQ.  
For East Penn Manufacturing  
LEON FRIEDBERG, ESQ.  
For Genuine Parts Company

MARIA GIANNIRAKIS, ESQ.  
For the U.S. Trustee

Transcribed by:

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1 THE CLERK: All rise. This United States  
2 Bankruptcy Court is now in session, the Honorable  
3 Pat E. Morgenstern-Clarren presiding.

4 THE COURT: Please be seated. Good morning.  
5 This is 06-10605, Procare Automotive Service Solutions,  
6 LLC. This morning's hearing is on the Debtor's request  
7 to approve a sale of its assets free and clear of liens  
8 and to assume and assign certain executory contracts  
9 and unexpired leases. The Debtor filed a memorandum in  
10 support of that request yesterday.

11 There were a number of objections that were filed  
12 and withdrawn. I'll just read those as a group.  
13 Marketplace Express, Robert Dunbar, Wurster Family  
14 Irrevocable Trust, Thomas Lurie and Westwater Company.  
15 So we won't need to address any of those this morning.

16 The objections that have been filed and not  
17 withdrawn are these: Genuine Parts Company, East Penn  
18 Manufacturing, The Official Committee, Pro Investments,  
19 State of Ohio State Fire Marshal, BP Products North  
20 America and Stoney Hollow Tire.

21 We will begin, please, with appearances, starting  
22 with the Debtor.

23 MR. LEPENE: Good morning, Your Honor. Alan  
24 Lepene with the law firm of Thompson Hine, on behalf of  
25 the Debtor. And with me is Jeremy Campana of Thompson

1 Hine.

2 THE COURT: Thank you.

3 MR. OPINCAR: Good morning, Your Honor.

4 Scott Opincar of McDonald Hopkins, on behalf of the  
5 Official Committee of Unsecured Creditors.

6 THE COURT: Thank you.

7 MR. SCHONBERG: Good morning, Your Honor.

8 William Schonberg, Benesch, Friedlander, Coplan &  
9 Aronoff, on behalf of Key Mezzanine Capital and Regis  
10 Capital Partners. And with me this morning is my  
11 colleague, Stuart Laven.

12 THE COURT: Thank you.

13 MR. SCHONBERG: Thank you.

14 MR. GELBER: Good morning, Your Honor.

15 Lawrence Gelber of Schulte, Roth & Zabel in New York,  
16 here on behalf of Monro Muffler Brake, the proposed  
17 purchaser. And with me in Court today is Mr. David  
18 Aberzazzy, the Controller of Monro.

19 THE COURT: Would you spell your last name  
20 for me, please?

21 MR. GELBER: G-E-L B as in boy, E-R.

22 THE COURT: Thank you. Mr. Gelber, are you  
23 admitted in the Northern District of Ohio?

24 MR. GELBER: Your Honor, I've been admitted  
25 pro hac vice for this case.

1 THE COURT: Great. Thank you.

2 MR. CAROTHERS: Good morning, Your Honor.

3 Pat Carothers, Thorpe, Reed & Armstrong, on behalf of  
4 Stoney Hollow Tire.

5 THE COURT: Thank you.

6 MR. DEBITETTO: Good morning, Your Honor.

7 Rocco Debitetto, Hahn, Loeser & Parks, on behalf of  
8 East Penn Manufacturing.

9 THE COURT: Thank you.

10 MR. KERN: Good morning, Your Honor. Timothy

11 Kern, Assistant Attorney General with the State of  
12 Ohio, representing the State Fire Marshal.

13 THE COURT: And would you spell your last  
14 name for me, please?

15 MR. KERN: K-E-R-N.

16 THE COURT: Thank you very much.

17 MS. GIANNIRAKIS: Good morning, Your Honor.

18 Maria Giannirakis on behalf of the United States  
19 Trustee.

20 THE COURT: Thank you.

21 MR. LEEN: Good morning, Your Honor. Edward

22 Leen from Kelley, Drye & Warren, on behalf of BP  
23 Products North America, Inc.

24 THE COURT: Thank you.

25 MR. LEEN: Your Honor, I have a pending pro

1 hac vice application.

2 THE COURT: Granted.

3 MR. LEEN: Thank you.

4 THE COURT: Would you spell your last name  
5 for me, please?

6 MR. LEEN: L-E-E-N.

7 THE COURT: Thank you.

8 MS. KOCH: Good morning. Suzanna Koch for JP  
9 Morgan Chase.

10 THE COURT: Thank you.

11 MR. FRIEDBERG: Good morning, Your Honor.  
12 Leon Friedberg, Carlisle, Patchen & Murphy, on behalf  
13 of Genuine Parts Company.

14 THE COURT: Thank you. Mr. Lepene, you may  
15 proceed.

16 MR. LEPENE: Thank you, Your Honor.

17 As Your Honor has noted, we are here on the motion  
18 for authority to sell substantially all of the assets  
19 of Procare Automotive Service Solutions. Your Honor,  
20 pursuant to the sale procedures order that was entered  
21 on March 28th, 2006, the Debtor served notice of its  
22 intent to sell substantially all of its assets and to  
23 assume and assign unexpired leases and executory  
24 contracts to Monro Muffler Brake, Inc. or to a party  
25 that made a higher and better offer than the \$14

1 million stalking horse bid that Monro had previously  
2 made.

3 In addition to serving the notice of its intent to  
4 sell its assets and assign unexpired leases and  
5 executory contracts, the Debtor also served notice on  
6 April the 3rd of proposed cure amounts to the non-  
7 Debtor parties to the unexpired leases and executory  
8 contracts that were proposed to be assumed and  
9 assigned. And then with respect to a number of those,  
10 an amended notice with respect to proposed cure costs  
11 was served on April the 12th.

12 The sales procedures order established a deadline  
13 for parties to file objections to the sale as well as  
14 objections to the proposed cure amounts. I believe  
15 under the procedures order that the deadline was fixed  
16 at April 21 for filing those objections. And as Your  
17 Honor has noted, a number of objections have been  
18 filed.

19 Before turning to those objections that still  
20 remain, let me address, first of all, the results of  
21 the sale process so that the Court and the parties in  
22 interest are aware of what ultimately we are now  
23 proposing to accomplish.

24 The Debtor, in conjunction with its investment  
25 banker, BB&T Capital Markets, and pursuant to the sales



1 procedures order, did conduct a thorough and we think  
2 vigorous process to identify other prospective  
3 purchasers besides Monro who might have an interest in  
4 all or some of the Debtor's assets. A number of  
5 confidentiality agreements during this process were  
6 executed. Due diligence was undertaken.  
7 Interestingly, a number of the parties expressed an  
8 interest in less than all of the assets looking at  
9 particular markets; the Dayton market, for example, or  
10 the Toledo market. And the investment banker did  
11 attempt to bring those peoples -- people together to  
12 form consortiums, if you will, so that we could account  
13 for all of the stores and make a competitive bid or  
14 present a competitive bid that would account for all of  
15 the stores and truly be competitive to the offer that  
16 Monro had made which was for all of the stores in the  
17 chain.

18 So those attempts were done as were -- were  
19 undertaken, as well as attempting to identify people  
20 who would have an interest in the entire chain. That  
21 process continued right up to the bid deadline, which  
22 under the procedures order was April the 25th. On that  
23 day two bids were received in addition to the Monro  
24 stalking horse bid that had previously been presented  
25 to the Court. One of those bids was limited to stores

1 in Dayton and Columbus and was only for approximately  
2 \$1.5 million, was not tied into the other bid that was  
3 presented so it really was one that essentially didn't  
4 qualify under the terms of the sales procedures order.

5 The other bid was for the entire chain and was  
6 made by a company called Somerset Tire Service. And  
7 that bid was in an amount that at the auction was  
8 determined to be the initial highest and best bid that  
9 had been received. The gross amount of that bid was  
10 \$15.2 million. However, the net value to the estate,  
11 based on the conditions that were set forth in that bid  
12 and taking into account if that bid were accepted, the  
13 payment of the breakup fee that would have to be made  
14 to Monro, resulted in our determination, that is the  
15 Debtor's determination after consultation with counsel  
16 for the Creditors Committee and the professionals for  
17 the Creditors Committee, again as contemplated by our  
18 bid procedures order, the determination was made that  
19 the value of that bid was, in reality, \$14,250,000.

20 We then commenced the auction on April the 26th at  
21 that point and Monro increased its bid to \$14,650,000.  
22 At that point STS declined to go any further and Monro  
23 was declared to be the winning bidder. We did inquire  
24 as to all of those who were in attendance as to whether  
25 anybody at the auction was prepared to make a higher

1 and better offer than the \$14,650,000 bid that Monro  
2 had made and no one responded to that inquiry. So we  
3 concluded the auction and we declared that Monro was  
4 the successful bidder at the gross amount of  
5 \$14,650,000.

6 I should also point out that in addition to the  
7 \$14,650,000 cash offer, as part of the negotiation  
8 there were two pieces of real estate that on -- as to  
9 which the Debtor is the owner but it does not operate  
10 Procure Automotive repair stores. These are sites that  
11 are actually leased to others for the purpose of  
12 operating gas stations so that they are rental income  
13 property and Monro has agreed that these would be  
14 excluded from the sale, essentially because they're not  
15 part of the operating business of Procure. So we were  
16 able to reach that agreement as well, which further  
17 enhances the consideration since these are income-  
18 producing properties, further enhances the value, if  
19 you will, that ultimately will be realized by the  
20 estate.

21 THE COURT: What does the Debtor intend to do  
22 with those two pieces of real estate?

23 MR. LEPENE: We will come before the Court  
24 with a motion. We will seek to sell those properties.  
25 We ultimately, as I think we have indicated, would plan

1 to prepare a plan of liquidation in this case. And in  
2 conjunction with that but probably prior certainly to  
3 our efforts to get a plan confirmed, we will come  
4 before the Court and propose a process for selling  
5 those particular properties.

6 Most of the objections have been resolved.  
7 Certainly most and I think all with respect to cure  
8 amounts have been resolved. Your Honor mentioned Pro  
9 Investments. I know that Mr. Campana has been in  
10 discussions with the attorney for Pro Investments. I  
11 don't believe anyone entered an appearance here today,  
12 but I believe the representation has been made to Mr.  
13 Campana that a settlement has been reached and we can  
14 address that, Your Honor, later on in the proceeding in  
15 terms of what that particular settlement entails.

16 THE COURT: Why don't we do it now as long as  
17 we're there.

18 MR. LEPENE: Fine, Your Honor. If I could  
19 ask Mr. Campana to address that?

20 THE COURT: Certainly.

21 MR. CAMPANA: Good morning, Your Honor.  
22 Jeremy Campana on behalf of Procure.

23 A settlement has been reached, as Mr. Lepene  
24 indicated, and counsel for Pro Investments represented  
25 that he would be filing a notice of withdrawal of their

1 objection by the time of the hearing. Apparently, no  
2 withdrawal has been filed yet.

3 Pro Investments filed a cure claim objection in  
4 the amount of \$23,000 and, based on the merits of that  
5 objection, a settlement was reached in the amount of  
6 \$13,000 which Procure believes is acceptable and a  
7 settlement agreement was reached.

8 THE COURT: Thank you. I'll mark that one as  
9 withdrawn then.

10 MR. CAMPANA: Thank you.

11 MR. LEPENE: Your Honor, the only other issue  
12 with respect to cure amount that I believe remains is  
13 with BP Products North America, and I think that they  
14 also have filed an objection to the sale. So what I  
15 would propose to do is first address those objections  
16 that I believe we have essentially resolved. And  
17 counsel for the various parties with respect to those  
18 particular objections that have been filed I believe  
19 are in the courtroom with the possible exception of GE.  
20 I wasn't sure whether anyone entered an appearance on  
21 behalf of GE. But if I might run down the list and see  
22 if we can narrow the issues in terms of what objections  
23 truly remain at this point.

24 The first objection that I would address is that  
25 of Genuine Parts. And I would also include with that

1 Auto Zone because those are both reclamation claimants.  
2 And I know we've heard previously in connection with  
3 the DIP financing order from counsel for Genuine Parts.  
4 I believe their concern primarily is that nothing in  
5 this order would impair in any way their right to  
6 assert their reclamation claims. And, of course,  
7 language to that effect was worked out in connection  
8 with the final DIP financing order.

9 With respect to what we are proposing to do here,  
10 as we indicated in the final DIP order, we will be  
11 escrowing from the sale proceeds that are realized if  
12 the Court does approve this sale, a portion of the sale  
13 proceeds in the full amount of the reclamation demands  
14 that we have received. And so I believe by virtue of  
15 our being prepared to do that and having provisions to  
16 that effect included in the sale order or at least the  
17 sale order will adopt the provisions in the DIP  
18 financing order that, in fact, require that, that I'm  
19 hopeful that those objections essentially have been  
20 resolved.

21 THE COURT: Let's pause there for a moment.  
22 Mr. Friedberg, is there anything that is unresolved?

23 MR. FRIEDBERG: No, Your Honor. I believe  
24 that the representations of Mr. Lepene adequately  
25 address the Genuine Parts matters.

1 THE COURT: Is the objection withdrawn then?

2 MR. FRIEDBERG: I think it's resolved.

3 THE COURT: Resolved. Fine. We'll mark it  
4 resolved.

5 MR. LEPENE: Your Honor, the next objections  
6 that I would address are those that were filed by East  
7 Penn Manufacturing and also a response that was filed  
8 by Stoney Hollow. I put those two creditors in the  
9 same category because they are the holders of alleged  
10 purchase money security interests in inventory sold to  
11 the Debtor prepetition, and again, we addressed their  
12 situation in the DIP financing order in terms of  
13 providing both of them with adequate protection.

14 With respect to the objections that they have  
15 raised, the principal objection is that we agree to pay  
16 them from the sale proceeds the amount that -- that  
17 they are owed based on their asserted secured claim.  
18 While we are not prepared to include language in the  
19 order to that effect and given the fact that the  
20 Committee does have rights to investigate and satisfy  
21 itself as to the status of their prepetition security  
22 interests, what we do propose in the order is again to  
23 escrow from the sale proceeds a portion of the proceeds  
24 in the full face amount of their alleged secured  
25 claims. That does not mean that we acknowledge that

1 they are fully collateralized in the amount of their  
2 claim, but we are prepared to escrow the full amount of  
3 their claim pending again further proceedings in the  
4 Court relative to the distribution of funds once their  
5 claims, in fact, have been determined and allowed.

6 THE COURT: Has that offer been accepted by  
7 the creditors or is that still in dispute?

8 MR. LEPENE: Well, I think probably we ought  
9 to hear from them. Just we have proposed that in the  
10 response that we made but I have not had the  
11 opportunity to specifically discuss with them. I know  
12 that we did circulate yesterday a proposed sale order  
13 that had these provisions that also addressed the other  
14 issues that East Penn had raised. And my understanding  
15 is or my belief is that the terms of the proposed sale  
16 order that we circulated at least would be acceptable  
17 to East Penn. I am confident they'll be acceptable to  
18 Stoney Hollow as well but it probably would make sense  
19 to get confirmation of that fact on the record at this  
20 point.

21 THE COURT: Mr. Debitetto, is there any part  
22 of the objection of East Penn that is not resolved by  
23 the statements just made?

24 MR. DEBITETTO: Your Honor, may I have one  
25 moment with Mr. Lepene?



1 THE COURT: Certainly.

2 MR. DEBITETTO: Thank you.

3 Your Honor, the proposed order, as modified and  
4 just agreed to here, is acceptable to East Penn and  
5 it's providing for the escrow of sufficient proceeds to  
6 pay our claims subject to allowance thereof. And Your  
7 Honor, with that, I would say our objection is  
8 resolved.

9 THE COURT: Thank you. And Mr. Carothers for  
10 Stoney Hollow, is there any part of Stoney Hollow's  
11 position that is not resolved by Mr. Lepene's  
12 statements?

13 MR. CAROTHERS: Your Honor, the order that  
14 was sent to us last night is fine with Stoney Hollow.  
15 The only issue that remains from Stoney Hollow's  
16 perspective is the timing by which the objections to  
17 the allowance of the validity of the claims would be  
18 brought by the Unsecured Creditors Committee. I'm  
19 happy to address that now or in response to the --

20 THE COURT: Is that a part of the proposed  
21 sale order?

22 MR. CAROTHERS: It was not a part of the  
23 proposed sale order although the Unsecured Creditors  
24 Committee raised that as part of their objection to  
25 which we replied to.

1 THE COURT: Mm-hmm. I'm really not inclined  
2 to expand the arena to include issues that aren't  
3 directly raised by the sale, so let's hold that aside.

4 MR. CAROTHERS: That's fine, Your Honor.

5 THE COURT: Thank you. In the meantime, I'll  
6 mark this as resolved.

7 MR. LEPENE: Your Honor, the next objection  
8 that I would address is that limited objection or  
9 reservation of rights filed by the Creditors Committee.  
10 And I believe that the Committee essentially wanted to  
11 make certain that the rights that were provided to it  
12 under the DIP order, that's the DIP financing order and  
13 the provisions in that order governing the disposition  
14 of sale proceeds, would be preserved. They also wanted  
15 assurance that any allocation of the purchase price as  
16 between the Debtor and the buyer pursuant to the terms  
17 of the asset purchase agreement would not be in any way  
18 determinative of the value of the individual assets for  
19 purposes of distribution under a plan of liquidation or  
20 subject to further proceedings before the Court. All  
21 of that certainly is consistent with the Debtor's  
22 intentions. We have included language to that effect  
23 in the proposed sale order. And I did receive an  
24 acknowledgment from Mr. Opincar on behalf of the  
25 Committee that the provisions that we've included in

1 the proposed sale order are satisfactory to the  
2 Committee.

3 So I do believe that the Committee is prepared to  
4 withdraw its objection or that its concerns have been  
5 resolved. Obviously, Mr. Opincar is here and can speak  
6 for himself in that regard.

7 THE COURT: Mr. Opincar, is there anything  
8 that is not resolved by Mr. Lepene's statements?

9 MR. OPINCAR: No, Your Honor, and the  
10 Committee will withdraw its limited objection.

11 THE COURT: Thank you.

12 MR. OPINCAR: Thank you.

13 MR. LEPENE: Your Honor, that leaves GE  
14 Capital, the State of Ohio Fire Marshal and BP Products  
15 North America, if I've got my count correct here. And  
16 so if I might, let me address those objections in that  
17 order, if the Court will allow me?

18 THE COURT: Certainly.

19 MR. LEPENE: We do not believe that any of  
20 those objections are meritorious. We believe that each  
21 of them should be overruled.

22 With respect to GE Capital, it holds a leasehold  
23 mortgage on a ground lease on which our store in New  
24 Albany, Ohio, sits. They also have a security interest  
25 in the building and in the equipment in that store. In

1 the paper that they filed they argue that the sale  
2 can't be authorized free and clear of their liens  
3 because they haven't consented to the sale.

4 THE COURT: May I ask you to pause for one  
5 moment? Is someone here representing GE? Did I miss  
6 an appearance?

7 MR. REDMOND: Your Honor, my name is Ian  
8 Redmond and I am representing GE. We had filed  
9 something some time ago which was denied and we have  
10 not filed an objection subsequent to that.

11 THE COURT: Thank you. That was also my  
12 understanding was that there was no GE objection that  
13 was on in connection with the sale. So I think we  
14 can -- thank you, Mr. Redmond, for clarifying. I think  
15 we're all set on that one.

16 MR. LEPENE: Thank you, Your Honor. I had  
17 thought that in their -- the objection that they had  
18 previously filed they had not only objected to the bid  
19 procedures, and that was denied, but they had also  
20 objected to the sale as well. But if there is no  
21 objection, we obviously can move on.

22 That would bring us to the objection filed by the  
23 State of Ohio Fire Marshal. And Your Honor, the basis  
24 for that objection, as I understand it from the papers  
25 that have been filed, are various environmental claims

1 arising under Ohio and federal law with respect to the  
2 maintenance of certain underground storage tanks. And  
3 they, in their papers, have a schedule that identifies  
4 three locations at which they said there are issues  
5 with respect to these storage tanks.

6 As a threshold matter I would say that they do not  
7 have their facts precisely correct. With respect to  
8 one of the sites, in Dayton, Ohio, where their claim is  
9 that Procure never filed a closure report with respect  
10 to the tank at that store, the fact is that Procure  
11 filed such a closure report in December of 2004.  
12 Procure has corresponded with the appropriate  
13 regulatory authority repeatedly to advise them that  
14 that report, in fact, has been filed. I have a copy of  
15 the report actually in the courtroom.

16 THE COURT: Would you give that to Mr. Kern,  
17 please. Maybe we can get that one resolved.

18 MR. LEPENE: With respect to one of the other  
19 stores, I believe it's in the Cincinnati area, Your  
20 Honor, the fact is that that store was previously sold.  
21 We no longer own the store. And in fact, in any event,  
22 it's obviously not part of the sale that is before you  
23 today. So that, in fact, the issues that they're  
24 raising relate to only one underground storage tank.  
25 But much more importantly than that, aside from the

1 facts, Your Honor, the objection is legally deficient.  
2 It is based on the State's belief that they have an  
3 interest in the property that is being sold and that  
4 without their consent, because they have an interest in  
5 the property, we cannot sell free and clear of their  
6 alleged interest under Section 363(f) of the Bankruptcy  
7 Code. The fact is the State does not have an interest  
8 in the property as that term is defined under the  
9 Bankruptcy Code. And I think the cases are very clear  
10 in that regard. What 363(f) deals with are liens and  
11 encumbrances in property and the ability of a  
12 Bankruptcy Court to authorize a sale free and clear of  
13 those liens and encumbrances. Those are the interests  
14 that the Code is referring to. We do not need the  
15 consent of the State of Ohio to sell the property in  
16 question pursuant to the provisions of Section 363(f).  
17 They do not have an interest in the property that would  
18 permit them to require that they consent to this sale.  
19 So on that point alone there is no legal basis, no  
20 legal support for the objection that they have raised.

21 The other ground of their objection is based on  
22 the Supreme Court's decision in the Midlantic case.  
23 And they claimed that on the basis of that authority we  
24 are not permitted to sell this property to Monro  
25 Muffler. As the Court I'm sure is aware, Midlantic was

1 an abandonment case. That was a case in which the  
2 Supreme Court said that where a Debtor or Trustee was  
3 responsible for property, owned property and sought to  
4 abandon it and where there was an imminent threat to  
5 public health, safety or welfare, there was no  
6 authority under Section 554 to abandon that property,  
7 the rationale being that there would then be no one  
8 responsible for the property in question.

9 Our motion, the motion that is before you today,  
10 does not seek authority to abandon anything. We are  
11 selling property to Monro Muffler who happens to be a  
12 party that is far better capitalized than we are to  
13 operate the property that we are selling to them on a  
14 going forward basis. Whatever claims the State of Ohio  
15 Fire Marshal may have with respect to the one tank that  
16 is at question will be dealt with in our plan of  
17 liquidation or will be dealt with in the claims  
18 resolution process under the provisions of the  
19 Bankruptcy Code. Whatever priority their claim may  
20 have will be determined by the Court. But there  
21 clearly is no legal support for the State to come in  
22 and say that under Section 363 we do not have the  
23 right -- or I should say the Court does not have the  
24 power to authorize a sale, this particular sale, to  
25 Monro Muffler.

1 So, Your Honor, on that basis we think, very  
2 clearly, the objection of the State Fire Marshal should  
3 be overruled.

4 THE COURT: Thank you. May I hear from the  
5 State, please?

6 MR. KERN: Yes, Your Honor. Thank you. My  
7 name is Timothy Kern. I'm Assistant Attorney General  
8 with the State of Ohio and I represent the State Fire  
9 Marshal in this matter.

10 What Debtor's attorney failed to mention is that  
11 another provision of the Bankruptcy Code, which is 28  
12 USC Section 959(b), and that section clearly says that  
13 a Debtor-in-Possession has the responsibility to comply  
14 with all laws, state regulations and all statutes that  
15 have regulatory requirements.

16 Now, in addition to that, that Code section was  
17 recognized by the U.S. Supreme Court in Ohio versus  
18 Kovacs, which is 469 US 274. And in that case the  
19 Supreme Court clearly said that anybody that was in  
20 possession of property was required to comply with the  
21 environmental statutes of the State of Ohio, because  
22 that was a case obviously brought by the State of Ohio.

23 Now, in this particular situation, and I don't  
24 think there's any dispute, Procure is the owner and  
25 operator of the tank systems at all three sites. So



1 since they are in possession of those tank systems,  
2 they currently, right now have the responsibility to  
3 comply with all the Bureau of Underground Storage Tank  
4 Regulations at these three sites.

5 Now, all three sites have ongoing regulatory  
6 requirements. Now, the first site, in Dayton, we are  
7 now looking at the closure report and we may have  
8 missed the fact that that report had been submitted.  
9 But that is not the end of the story with that site.  
10 What happened there is the tanks were removed. And  
11 under the regulations they are required to submit a  
12 closure report. The next step is the regulators at the  
13 Bureau of Underground Storage Tank Regulations need to  
14 look at that report and try to determine if there's any  
15 issues where there has been releases at that particular  
16 site. And after that is done they will get  
17 documentation from -- it's called BUSTER. BUSTER will  
18 send them documentation of whether they have to go in  
19 and do further assessment at the site.

20 Now, the other two sites, you know, we have a  
21 witness here today and I don't believe there's any  
22 dispute, but at the other two sites they also are  
23 currently registered and they own the tanking systems  
24 at those sites and they also were operating the tanking  
25 systems. Now, as to the one site, and that's the site

1 that's in Mayfield Heights, they are required to submit  
2 what they call the Tier 1 Assessment. And that's  
3 they've already done their closure report and there are  
4 some issues at the site and they have to do further  
5 assessment to try to determine the extent of  
6 contamination.

7 In the Cincinnati site, which they are also  
8 registered for those tanks and they have -- they  
9 currently own and operate those tanks, that site's  
10 further on. It's called in the Tier 2 Assessment stage  
11 where they're getting close to determining what they  
12 have to do in terms of the cleanup.

13 Now, the problem with Debtor's argument is that  
14 they are currently responsible right now under 28 USC  
15 959(b) to make sure that all the BUSTER regulatory  
16 requirements are met. Once the sale goes through and  
17 they no longer are in possession of those sites, they  
18 no longer will have responsibility because they are no  
19 longer in possession to meet those requirements. And  
20 they make a statement here that the new buyer is in a  
21 better position to meet those requirements. The only  
22 problem with that is that under the statute, which is  
23 RC 3737, which is the statute that, you know, sets  
24 forth the regulatory authority for underground storage  
25 tanks, is that the new buyer or the new operator that

1 was not the owner/operator during the time of the  
2 release, has no statutory requirement to deal with  
3 previous releases. So what's going to happen here is  
4 that if Monro takes over at least two of the sites,  
5 those releases that are at the sites, they will not  
6 have the responsibility to deal with those releases and  
7 clean them up. That responsibility goes to Procare.  
8 But then once Procare deposeses themselves of the  
9 property through the sale, they're going to have the  
10 argument that they no longer have to be responsible to  
11 meet those environmental obligations. Now, right,  
12 they'll deal with our claim, which I don't even think  
13 we filed a claim at this stage, at a later stage, but  
14 then they're going to be in the position to argue that  
15 we have nothing but a general unsecured claim and  
16 they'll deal with it that way.

17 Right now they have the responsibility, under the  
18 Bankruptcy Code and the U.S. Supreme Court decision in  
19 Ohio versus Kovacs, to deal with whatever they need to  
20 do at those sites and get those sites completely in  
21 compliance with the BUSTER regulatory requirements.  
22 And that's why we've made our objection and that's why  
23 we think we have the right to have them do something to  
24 make sure that those environmental regulations are  
25 going to be met.

1 Now, we've dealt with this issue in other  
2 bankruptcies not in this Court. But one of the big  
3 bankruptcies we've dealt with this issue was the Dairy  
4 Mart bankruptcy. And what was done there is an escrow  
5 account was set aside by the Debtor to deal with all  
6 the environmental requirements. And if we could get  
7 some sort of agreement from the Debtor on some sort of  
8 trust fund or an escrow account and that money would be  
9 a set aside. And I think in this situation if you're  
10 talking about a \$14.6 million, I think there is enough  
11 money that could be set aside to deal with the problems  
12 at these three sites and then obviously if there's  
13 money left over after all the sites get back into  
14 compliance, then Debtor could take that money and put  
15 it back into their estate.

16 But I don't agree with what the Debtor says.  
17 Obviously, whether we can or cannot prevent the sale,  
18 what we can do is make the Debtor, under the Bankruptcy  
19 Code, come into compliance at all three of these sites.  
20 And at this stage, they've refused to do it.

21 THE COURT: Thank you. Anything further from  
22 the Debtor?

23 MR. LEPENE: Yes, Your Honor.

24 Your Honor, again, just so the facts are straight  
25 with respect to the sale. The only site that is being

1 conveyed to Monro that is the subject of the objection,  
2 is the store in Mayfield Heights. The other two are  
3 not being conveyed to Monro, so that the issues that  
4 Mr. Kern is raising with respect to whatever  
5 responsibilities we may have are simply irrelevant with  
6 respect to the motion that is before you. We're only  
7 dealing with one site.

8 I think Mr. Kern clearly has indicated in terms of  
9 his comments with respect to establishing an escrow  
10 account or what have you, that what we're dealing with  
11 here is essentially a claim that they will have against  
12 the Debtor for the payment of money. That's really  
13 what this is all about. And as I suggested, we will  
14 deal with that claim in connection with the plan of  
15 liquidation or in connection with further proceedings  
16 that are brought before this Court. Whether that claim  
17 is unsecured, Mr. Kern has suggested that we will try  
18 to make that argument. Perhaps we will. I suspect  
19 that Mr. Kern will make the argument that that is an  
20 administrative expense claim that needs to be  
21 satisfied.

22 We are, in fact, planning to set aside monies, as  
23 the Court knows from the provisions of the DIP  
24 financing order, to cover administrative expense claims  
25 in this particular case. But the fact is that under

1 the provisions of the Bankruptcy Code, the State does  
2 not have the ability to prevent the Court from  
3 authorizing this sale. They do not have an interest in  
4 the property within the meaning of the Bankruptcy Code.  
5 We have the authority to sell the property free and  
6 clear of interests. They do not have an interest in  
7 the property. Whatever claims they have will be and  
8 can be asserted against the proceeds that will be  
9 generated from the sale. And again, if they have an  
10 administrative expense priority claim, if that's how it  
11 ultimately would be determined, then they will be  
12 entitled to have that claim satisfied in full. If it's  
13 determined to be a general unsecured claim, then they  
14 will share in whatever recovery is made for the benefit  
15 of unsecured creditors. But they do not have the  
16 ability to prevent the Court from authorizing this sale  
17 as long as we meet the requirements of Section 363,  
18 which we think we clearly do.

19 THE COURT: All right, thank you. This is  
20 the Court's decision on this issue. The facts are not  
21 entirely clear but this is one of those situations  
22 where it isn't necessary to pin down the facts in order  
23 to make a decision. The parties are in agreement that  
24 at least one site is subject to the State's concern and  
25 so the Court's opinion is limited to that actual

1 situation. This is not intended to make any kind of  
2 binding determination of either party's rights with  
3 respect to the other two sites or even with respect to  
4 the Mayfield site.

5 There is agreement between the parties that the  
6 State has a legitimate concern over environmental  
7 issues that have arisen at the real estate. Today's  
8 issue, however, is a more narrow issue. It is whether  
9 the Court should approve the sale of the property in  
10 the face of the State of Ohio's objection that the  
11 Debtor has not complied with its responsibilities under  
12 state law as confirmed by the Bankruptcy Code Section  
13 959, which does require a Debtor to comply with State  
14 and regulatory requirements.

15 The two different issues that have been  
16 intertwined in this presentation by the lawyers,  
17 however, are these. The first is does the State have  
18 an interest in the property that would trigger the  
19 sections under 363(f)? And the second is does the  
20 State have a claim against the Debtor's assets? It's  
21 only the first issue that is relevant to today's  
22 proceedings.

23 Section 363(f) says that the Trustee may sell  
24 property under Subsection (b) or (c) of the section  
25 free and clear of any interest in such property of an

1 entity other than the estate only if. The section then  
2 goes on to spell out five different situations. So for  
3 this section to apply at all, an objecting creditor has  
4 to have an interest in the property. The State of Ohio  
5 has an interest in seeing that its laws are complied  
6 with but it has not shown that it has an interest in  
7 the property that is being sold. The property that is  
8 being sold is not subject to a lien or an encumbrance  
9 held by the State of Ohio and therefore, the remainder  
10 of this section does not apply.

11 The State has also cited the Midlantic case  
12 decided by the Supreme Court. This Court agrees with  
13 the Debtor's interpretation that that is a Court  
14 decision that applied to an effort to abandon  
15 contaminated property in a situation where no one would  
16 be responsible for it and the Trustee essentially was  
17 throwing up his hands and saying I don't want to have  
18 anything to do with this. Under that situation the  
19 Supreme Court said that the Trustee was not permitted  
20 to abandon the property. This is not though a  
21 situation where the Debtor is proposing to abandon the  
22 property and walk away. Debtor is proposing to sell  
23 it. The proceeds of the sale will come into the  
24 estate. Those proceeds will be available for  
25 distribution to creditors who have allowed claims. So



1 this is quite a different case from the Midlantic case.

2 After the sale, the State -- or at any point  
3 actually, if the State has a claim against the Debtor's  
4 assets, it may feel free to file it. What the nature  
5 of that claim is in terms of priority or administrative  
6 claim, this Court is certainly not determining it  
7 today. But the Court is finding that the State's  
8 legitimate interest in having its environmental laws  
9 complied with is not a defense under 363(f) that can  
10 interrupt the proposed sale of the Debtor's property.  
11 So the objection is overruled for those reasons and  
12 I'll put on an order that states that.

13 MR. LEPENE: Thank you, Your Honor.

14 THE COURT: I would encourage the Debtor,  
15 obviously, as a next step, to cooperate with the State  
16 and find out what the issues are because it sounds like  
17 there are some that need to be addressed.

18 MR. LEPENE: We will certainly do that, Your  
19 Honor.

20 Your Honor, that brings us to the objection that  
21 was filed by BP Products North America, and they were  
22 both, as I recall, objection with respect to the sale  
23 as well as with respect to the proposed cure notices.

24 I believe that as far as the dollar amounts of the  
25 cure notices that we had proposed, all of those have

1 been worked out. Counsel for BP is here and obviously  
2 can confirm that. But I believe what we are left with  
3 as far as the BP objection is concerned is a dispute or  
4 a disagreement that relates to our proposed assumption  
5 and assignment to Monro of an environmental agreement  
6 dated September 30th, 1999. Under that agreement, BP  
7 agreed to indemnify Procure with respect to certain  
8 environmental obligations relating to various  
9 properties that were sold by BP to Procure in 1999, and  
10 Procure, in that agreement, agreed to indemnify BP with  
11 respect to certain environmental obligations that arose  
12 after the closing date of that sale with respect to  
13 certain of those properties. We included that  
14 agreement on the list of contracts to be assumed and  
15 signed. We sent out a cure notice with respect to that  
16 particular agreement that indicated our belief that the  
17 cure cost was zero with respect to that particular  
18 agreement. BP did not take issue with our cure cost  
19 proposal as to that particular agreement. What they  
20 did do was to propose that language be included in the  
21 sale order asking that Monro, as the assignee, the  
22 buyer and the assignee, essentially agree that in  
23 connection with its assumption of the agreement, its  
24 taking on the agreement by way of assignment, that it,  
25 Monro, would be liable for all obligations under that

1 agreement whether known or unknown to BP or the Debtor  
2 and whether such obligations were pre or post  
3 assumption. So that was the language that BP was  
4 asking that Monro agree to and have included in the  
5 proposed sale order. Monro, and I think  
6 understandably, has rejected that language.

7 The Debtor's position with respect to this is that  
8 that language isn't necessary, and for this reason. We  
9 believe that the extent of Monro's obligations in  
10 connection with the assumption and assignment of that  
11 agreement to it pursuant to the provisions of Section  
12 365 are really determinable as a matter of law under  
13 Section 365. Whatever obligations Monro takes on  
14 pursuant to that particular agreement again is  
15 determined under the provisions as a matter of law  
16 pursuant to the provisions of Section 265.

17 We believe that's what the order should provide.  
18 That's the type of language that should be included in  
19 the order. And it is for that basis that we don't  
20 believe the objection that BP has presented, again  
21 recognizing that all of the other issues have been  
22 resolved, this is the last issue with BP, we think that  
23 what they are asking for in terms of the language that  
24 they want included in the order goes beyond what is  
25 required. Section 365 will establish the rights and

1 responsibilities of the parties to that agreement on a  
2 going forward basis. And so it is our belief that  
3 their objection should be overruled and the sale should  
4 be confirmed.

5 That's our position with respect to this. I would  
6 imagine that counsel for both BP and perhaps Monro  
7 would want to be heard on this, Your Honor.

8 THE COURT: Mr. Leen, please.

9 MR. LEEN: Good morning, Your Honor. Edward  
10 Leen, Kelley, Drye & Warren, on behalf of BP Products  
11 North America, Inc.

12 Your Honor, our -- just a little bit of history  
13 here. BP --

14 THE COURT: Just a little, please.

15 MR. LEEN: Just a little. BP and Procure  
16 were once the same company. Procure was spun off of  
17 BP. So BP has a lot of different interests in -- in  
18 relationship with Procure.

19 When the sale was done or the spinoff, there was  
20 an environmental indemnification agreement entered into  
21 between BP and the predecessor to Procure, but Procure,  
22 and there's obligations that run back and forth.

23 The issue for today is that while the Debtor has  
24 taken the position that 365 says -- says what it says  
25 and that Monro is taking on the obligations, which I

1 think is what they're saying, there is much language in  
2 the order that goes on at length of how Monroe is not  
3 assuming any pre-closing obligations under any  
4 agreement. So therefore, if you have any  
5 indemnification issues that arose pre-closing, Monroe,  
6 under the order, arguably has not taken on that  
7 obligation. And that's why we had asked to have that  
8 language put into the order. And there was another  
9 reason we wanted to have the language put into the  
10 order as well, because it was smoother to do it that  
11 way than to determine what the cure cost would be if  
12 we're going to have to determine what the cure is  
13 because a cure would then take Tier 2 Assessments at  
14 each of the properties and that's going to take some  
15 while and that's not something that can be accomplished  
16 in a couple of months. That could take some time. So  
17 we were looking for the clearer, cleaner assumption.  
18 And we believe also under 365 they take whatever  
19 obligations existed as of the closing as well, but the  
20 order arguably cuts that off.

21 THE COURT: Mm-hmm. I don't have that order  
22 in front of me but from what you're saying, what if you  
23 just added a phrase that said Monroe doesn't assume pre-  
24 closing obligations except for agreements specifically  
25 assumed and assigned under the sale agreement? Would

1 that resolve your issue? Let me hear from BP first and  
2 then I'll be glad to hear from Monro.

3 MR. LEEN: I think it would but there is --  
4 there's -- as long as we -- I'd have to look at the  
5 order again but there's language in many different  
6 paragraphs that talk about free of the liens, claims,  
7 encumbrances. And to the extent that does not exclude  
8 any pre-closing obligations, indemnification  
9 obligations, then fine, that works for us. But I just  
10 want to make sure that argument's not made at a later  
11 time.

12 THE COURT: Mr. Gelber, please.

13 MR. GELBER: Good morning, Your Honor. Once  
14 again, Lawrence Gelber of Schulte, Roth & Zabel for  
15 Monro Muffler Brake.

16 I don't believe that the language that Your Honor  
17 suggested works for Monro. The asset purchase  
18 agreement is very clear that Monro is only assuming  
19 liabilities from the closing date going forward. The  
20 sale is free and clear of all liens, claims, interest  
21 and encumbrances. I believe what Mr. Leen is referring  
22 to and what BP is trying to assert is just simply  
23 another claim that arose pre-closing and that is one of  
24 the claims that the -- that the sale would be -- that  
25 the assets would be sold free and clear of.

1 THE COURT: So is it Monroe's position that it  
2 is not assuming --

3 MR. GELBER: No. It is Monroe's position that  
4 it is assuming the agreement. If as and to the extent  
5 there are pre-closing issues, those are not Monroe's  
6 issues. Those are issues between BP and the Debtor.  
7 Anything that arises from the closing date going  
8 forward, absolutely, we are assuming those. Just as  
9 with any other executory contract, we are taking the  
10 post-closing liabilities and leaving behind the pre-  
11 closing liabilities. As Mr. Leen and Mr. Lepene have  
12 both said, the pre-closing liabilities are something  
13 that are dealt with in cures. Section 365 provides in  
14 order to assume and assign you have to cure defaults.  
15 I don't know if these are actually defaults that are  
16 under the agreement. I honestly don't know. But there  
17 is nothing in Section 365 or anywhere else in the  
18 Bankruptcy Code, to my knowledge, that requires a  
19 purchaser of assets who's taking assets free and clear  
20 of all liens and claims to assume any post-closing  
21 liabilities -- I'm sorry, pre-closing liabilities  
22 unless it has expressly agreed to do so in the asset  
23 purchase agreement. And I can tell you that Monroe has  
24 not agreed in the asset purchase agreement to assume  
25 these liabilities.

1 THE COURT: So this is a substantive dispute.  
2 This is not a wordsmithing issue?

3 MR. GELBER: I think from Monro's perspective  
4 clearly it is a substantive dispute. I believe, and  
5 maybe I'm wrong, it's really a dispute between BP and  
6 the Debtor and Monro is sort of caught in the middle  
7 here. I can just tell you what Monro's position is.  
8 It is not something we bargained for and it is not  
9 something we are willing to take.

10 THE COURT: Thank you. Mr. Lepene?

11 MR. LEPENE: Your Honor, I think the point  
12 that I would stress with respect to this is that we  
13 went through a process which was approved by the Court  
14 in terms of the bid procedures and the sale procedures  
15 that we were to follow. We did send out in connection  
16 with those agreements that we were proposing to assume  
17 and assign, a designation to the various parties as to  
18 what the agreement was. We indicated what we believed  
19 the cure costs are. We don't believe we have any  
20 liability with respect to this particular agreement.  
21 So we designated in the proposed cure cost with respect  
22 to this particular agreement that was sent to BP, we  
23 indicated that we believe the cure costs were zero. If  
24 we suggested -- not suggested. It was part of the sale  
25 procedures, that if a party disagreed with that, if



1 they believed that they were was a liability and that  
2 there were cure costs that needed to be addressed as a  
3 condition of assumption and assignment of the  
4 agreement, they were obligated to come forward and  
5 identify that so that we could resolve that in  
6 connection with this sale hearing as to what the amount  
7 that they believed required to be paid as a cure cost  
8 in order to permit the assumption and assignment of the  
9 agreement. BP has not come forward. They didn't come  
10 forward in response to the deadline that was  
11 established pursuant to the procedures order and  
12 identify cure costs associated with this particular  
13 agreement. They did identify cure costs with respect  
14 to a number of the other leases that were being assumed  
15 and assigned and we have had extensive discussions with  
16 them and we've resolved every one of those amounts, so  
17 that with respect to the cure costs associated with all  
18 of those leases that are being assumed and assigned as  
19 to which they are lessor and real estate taxes that had  
20 accrued and needed to be accounted for, all of that has  
21 been agreed to pursuant to the process and the  
22 procedure that the Court established.

23 With respect to this I would suggest that the  
24 burden was on BP if they felt and disagreed with our  
25 assessment and belief that there were no outstanding

1 cure costs that needed to be paid in connection with  
2 the assumption and assignment of this particular  
3 agreement, the environmental agreement. They had the  
4 burden of coming forward and advising us as to what  
5 they believed those cure costs were. They did not do  
6 so. I don't believe that they are prepared to do so in  
7 Court today.

8 And so it is our belief, based on the procedures  
9 that were approved by the Court which we followed and  
10 which indicated that we would establish the amount of  
11 whatever the necessary cure costs were, and again a  
12 specific procedure for doing that, we believe that  
13 based on the record that has been established, the cure  
14 costs properly should be determined to be zero and the  
15 agreement therefore should be -- we should be  
16 authorized to assume and assign the agreement as part  
17 of this sale to Monro. And that essentially is our  
18 position.

19 THE COURT: Mr. Leen, is there something in  
20 BP's objection that said that there was a cure cost  
21 connected to the indemnity agreement.

22 MR. LEEN: On page 2 under A, it mentions  
23 environmental obligations. We had opened the issue  
24 with the Debtor regarding cure amounts on the  
25 environmental indemnification agreement.

1 THE COURT: This paragraph goes on to state  
2 cure amounts, which I assume now from what Mr. Lepene  
3 is saying, relate to the lease agreements; is that  
4 right?

5 MR. LEEN: It -- yeah. It says it was to  
6 cure notice we said we agree with everything on the  
7 cure notice to this extent.

8 THE COURT: Okay. Then the paragraph says --

9 MR. LEEN: That's the leases.

10 THE COURT: -- except regarding any  
11 environmental obligations and a couple other issues  
12 that don't seem to be relevant here, BP agrees to the  
13 following cure amounts. Is there anything in this  
14 obligation that then goes back and picks that up and  
15 says with respect to the environmental obligations this  
16 is the cure amount that BP is requesting?

17 MR. LEEN: No, because the cure amount is  
18 impossible to tell at this time. It requires a Tier 2  
19 Assessment at each of the locations in order to  
20 determine whether or not there is any leakage in any of  
21 the underground tanks.

22 THE COURT: Is it impossible or is it  
23 expensive?

24 MR. LEEN: No, it's not impossible. It's  
25 impossible to do it in the time frame provided for.

1 It's something we can do and we can get done.

2 THE COURT: Did BP file anything asking the  
3 Court to extend the deadlines to accommodate that  
4 issue?

5 MR. LEEN: No. We tried to work out with the  
6 Debtor and Monro on that issue. And we reserved our  
7 rights in this objection to amend any cure amounts.

8 THE COURT: Does BP have a witness today that  
9 it wishes to put on to address the cure amounts?  
10 Today's the day.

11 MR. LEEN: I understand. BP does not have a  
12 witness because there's no cure amount to put on  
13 because we just -- we don't know at this time. We  
14 just -- we don't know what the situation is at each of  
15 the locations.

16 THE COURT: Anything further then from BP?

17 MR. LEEN: No. That's it, Your Honor. Thank  
18 you.

19 THE COURT: Thank you. Mr. Lepene?

20 MR. LEPENE: Final point, Your Honor?

21 THE COURT: Briefly, please.

22 MR. LEPENE: Yeah, very briefly, Your Honor.

23 I would simply point out that this agreement has  
24 been in effect since 1999. They've had seven years to  
25 determine what the costs associated with these

1 properties are, if any. We don't believe there are any  
2 and we think that they simply have waited too long and  
3 there was never any request to extend the hearing with  
4 respect to this particular sale. And I would agree  
5 with Your Honor. We're here today and they don't have  
6 any evidence to put on. They -- and they're saying  
7 that they -- they don't know what the -- the cure costs  
8 are. We believe the cure costs are zero.

9 THE COURT: So from a legal analysis point of  
10 view, Mr. Leen, is BP's argument that the sale can't be  
11 approved with this agreement assigned because the cure  
12 amount has not been determined or is the legal argument  
13 something different than that?

14 MR. LEEN: It's -- it's either/or.

15 THE COURT: I'm sorry?

16 MR. LEEN: It's either one of two things.  
17 Either one, Monro takes the obligations.

18 THE COURT: Under what legal theory though?

19 MR. LEEN: Under 365, when they assumed it.  
20 We don't know if there are any defaults on the  
21 agreements. They're just assuming all the obligations  
22 under the agreement.

23 Or there is unresolved cure amounts and it can't  
24 be assumed and assigned.

25 THE COURT: So the objection of BP is to the

1 assumption and assignment?

2 MR. LEEN: Mm-hmm.

3 THE COURT: And the objection is that either  
4 Monro is required to make some additional affirmative  
5 statement before it can accept the assignment or the  
6 assignment isn't ripe to go forward because the cure  
7 amount is unresolved?

8 MR. LEEN: Yes, Your Honor.

9 THE COURT: All right, thank you.

10 This is the Court's decision. As part of the  
11 Debtor's request to sell its assets to Monro, the  
12 Debtor has included a request to assume and assign  
13 certain contracts under Bankruptcy Code Section 365.  
14 BP objects to that part of the sale that permits the  
15 assumption and assignment of an indemnity agreement  
16 that was entered into between BP and the prepetition  
17 Debtor in 1999. BP argues that the sale language is  
18 inadequate because Monro should be required to  
19 expressly state that it is assuming prepetition  
20 obligations under this agreement. And if that argument  
21 doesn't win the day, then the alternative argument made  
22 by BP is that essentially the issue is not ripe to go  
23 forward because the cure amount is unresolved. Without  
24 the cure amount being resolved, then the sale can't be  
25 approved because it includes an assumption and

1 assignment of a contract that is not yet ready to be  
2 assumed or assigned.

3 The parties' rights come from two sources in this  
4 case. One is from the Bankruptcy Code itself, Section  
5 365. The other is from the orders that this Court put  
6 on with respect to the proposed sale of the property.  
7 The Court entered an order that was agreed to by many  
8 parties and not objected to by anyone that set out a  
9 procedure for the Debtor to identify any agreements  
10 that it wished to assume or assign and to make  
11 proposals regarding the cure amounts that would be a  
12 predicate to the assumption and assignment. The order  
13 also gave each affected party the right and the  
14 obligation to come in and object to the cure amount and  
15 to propose a different amount. The orders then  
16 anticipated that any of those disputes would be  
17 resolved today, which is the day set for the  
18 evidentiary hearing on the assumption and assignment of  
19 the contracts, to the extent that they're included in  
20 the sale agreement.

21 BP filed an objection but it does not specifically  
22 reserve this particular issue. The language that  
23 counsel pointed to on page 2 of the objection simply  
24 says except to the extent of any environmental  
25 obligations, BP agrees to the following cure amounts

1 proposed by the Debtor. BP then goes on to list  
2 specific Procare sites and specific amounts that would  
3 cure the prepetition defaults under those lease  
4 agreements. BP does not then say: "and with respect to  
5 the environmental obligations that would arise under  
6 the indemnity agreement BP identifies this as the cure  
7 amount needed."

8 BP argues this morning that there's not enough  
9 time to identify the cure amounts. The Court, however,  
10 made it clear from the beginning that it would not rush  
11 this case through to the detriment of parties who did  
12 not have sufficient time to preserve and protect their  
13 rights and slowed the process down, to some extent, to  
14 make sure that all parties were notified and had a  
15 legitimate opportunity to identify their own concerns.  
16 This Court did not receive any request from BP to  
17 change that schedule in any fashion, and so the Court  
18 finds that BP has waived any rights that it might have  
19 had to extend the time frame for identifying and  
20 providing evidence on the cure amount.

21 Additionally, as stated by Debtor's counsel  
22 without contradiction, this agreement is from 1999, and  
23 to the extent that there was some investigation that  
24 needed to be done, it could surely have been done  
25 between 1999 and today's date, which is April 28th,



1 2006. To the extent that that might not have been an  
2 inquiry that BP would need to have made before the  
3 bankruptcy filing, it certainly could have identified  
4 that as an issue and gone forward after the bankruptcy  
5 filing.

6 So all of those reasons result in a finding that  
7 BP has waived any right to argue that the cure amount  
8 is unresolved and that additional time should be given  
9 or that it should be a cause to delay or derail the  
10 proceedings this morning in terms of the sale.

11 The second piece of BP's argument is that Monro  
12 should be required to make an additional affirmative  
13 obligation under Section 365. The Court agrees with  
14 Monro's argument and as echoed by the Debtor that  
15 Section 365 sets out the extent of the obligations that  
16 Monro will have following this sale and that there is  
17 nothing in that section that would require Monro to  
18 make an additional representation or to take on  
19 additional responsibilities. That objection -- that  
20 part of the objection then is also overruled.

21 So for the reasons just stated, BP's objections  
22 are overruled and the Court will put on an order that  
23 reflects that as well.

24 MR. LEPENE: Your Honor, I believe that that  
25 resolves all of the objections. I believe that to be

1 the case.

2 The -- let me just raise some additional points  
3 and would suggest I can do this by proffer. If the  
4 Court wants to hear testimony on these points,  
5 obviously, we can put witnesses on to testify.

6 THE COURT: What is the issue going to be?

7 MR. LEPENE: Just to -- for the record, the  
8 good faith of Monro so that they get the benefit of  
9 Section -- their status as a good faith purchaser so  
10 they get the protection of Section 363(m).

11 THE COURT: Please proffer the proposed  
12 evidence and then I'll ask if there's anybody who  
13 objects to the proffer, and if there's an objection,  
14 then we can go to a witness.

15 MR. LEPENE: We believe, Your Honor, that the  
16 facts that would support a finding that Monro is a good  
17 faith purchaser are that, first and foremost, this is a  
18 totally arm's length transaction. There is no  
19 connection as between the Debtor or an insider of the  
20 Debtor and Monro. Monro is a public company. This  
21 transaction was negotiated over a period of time. It  
22 was very closely scrutinized and it was intense  
23 negotiation with respect to the terms of the agreement  
24 and ultimately the purchase price. I would also say  
25 that, from the Debtor's perspective, we have found

1     Monro to be particularly accommodating in terms of the  
2     way they have approached this particular transaction.  
3     They have been the source of Debtor-in-Possession  
4     financing on what we believe to be very reasonable  
5     terms. And they did that despite the fact that we were  
6     engaged in a competitive bid process and through our  
7     investment banker did our best, and in fact, did  
8     identify at the inception of the auction a bid, a  
9     competitive bid that we determined to be a higher and  
10    better bid than the one that Monro had presented.  
11    Again, all in the context of Monro having financed our  
12    operations since the commencement of this case.

13           So for those reasons, Your Honor, and primarily  
14    because of the arm's length nature of the transaction,  
15    we think the evidence clearly establishes that they are  
16    a good faith purchaser and entitled to the protection  
17    of Section 363(m) of the Bankruptcy Code.

18           THE COURT: The Debtor has proffered evidence  
19    that the transaction was entered into in good faith and  
20    would entitle the purchaser to certain protections. Is  
21    there anyone who objects to the proffer and asks that  
22    the evidence be presented through testimony of a  
23    witness?

24           Nobody's responded. The Court accepts the proffer  
25    and makes the finding.

1 MR. LEPENE: Thank you, Your Honor.

2 The other thing that we would add for the record,  
3 although I don't believe there has been any objection  
4 raised in terms of assumption and assignment of leases  
5 or contracts as to Monro's ability to provide adequate  
6 assurance of future performance, we would note for the  
7 record again, Monro is a public company. During its  
8 last fiscal year its revenues were approximately \$337  
9 million and during its last fiscal year had a net  
10 income of approximately \$19.7 million. Again, we think  
11 that the record establishes adequate assurance of  
12 future performance with respect to all leases and  
13 contracts that are being assumed and assigned.

14 THE COURT: But no one raised that though as  
15 an issue; is that right?

16 MR. LEPENE: I don't believe so, Your Honor.

17 THE COURT: Then noted.

18 MR. LEPENE: Thank you, Your Honor.

19 The only other matter that I would raise is that  
20 we will -- we have circulated an order last evening. I  
21 believe that again now with the objections having been  
22 resolved, I think the order itself is acceptable  
23 certainly to the non-objecting parties. We will, if I  
24 might, hand that up to the Court so you might have an  
25 opportunity to review that. It does provide for a

1 waiver of the ten-day stay under Rule 6004(g), I  
2 believe it is. And the reason for that, Your Honor,  
3 and this clearly is of significance to the Debtor and  
4 to the Debtor's creditors in terms of the ultimate  
5 recovery. Monro is prepared to close this transaction  
6 tomorrow and to be open for business, you know, Monday  
7 morning. And that, obviously, reduces the losses,  
8 eliminates the losses that we otherwise have been  
9 suffering by reason of our operation of this particular  
10 business, so therefore enhances the recovery for  
11 creditors. If it is at all possible that this order  
12 could be entered today, obviously it would be very much  
13 appreciated so that we would be in a position to close  
14 the transaction tomorrow. The parties are geared up  
15 and prepared to do that, and anything the Court could  
16 do in that regard for us would be greatly appreciated.

17 THE COURT: Is there any party who objects to  
18 the request that the stay not be entered for the ten  
19 days?

20 Nobody has responded. The Debtor may include that  
21 in the proposed order. Please include the language  
22 that no party objected at the hearing to that  
23 provision.

24 MR. LEPENE: We will add that, Your Honor.  
25 It's not in the draft presently, but we will add that.

1 THE COURT: And if you send that over to the  
2 clerk's office by e-mail in the next hour or so, it'll  
3 be entered today.

4 MR. LEPENE: Thank you very much, Your Honor.

5 THE COURT: Thank you. Thank you to all the  
6 counsel who participated. Winners or losers,  
7 everybody's arguments were very interesting and I  
8 appreciate it. The hearing will conclude.

9 THE CLERK: All rise.

10 (END OF PROCEEDINGS)  
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1 State of Ohio )  
2 Cuyahoga County )  
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6 CERTIFICATE  
7  
8

9 I, Marc Eppler, a Notary Public, within and for the  
10 State of Ohio, do hereby certify that the above  
11 transcript is a true and accurate record of the hearing  
12 held before the HONORABLE PAT E. MORGENSTERN-CLARREN.  
13 This record was prepared from an audio recording provided  
14 by the Court.

15 IN WITNESS WHEREOF, I have hereunto set my hand and  
16 seal of office in Cleveland, Ohio on this 19th day of  
17 MAY, A.D., 2006.  
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21 \_\_\_\_\_  
MARC EPPLER  
22 Notary Public - State of Ohio  
my commission expires 9-14-2008  
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